No. 14759

United States Court of Appeals

for the Ninth Circuit

SCOTT PUBLISHING COMPANY, a Corporation,

Appellant,

vs.

RALPH RODGERS, Trustee in Bankruptcy of Mid-Columbia Publishers, Inc., Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court
Eastern District of Washington,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-8-55

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

JOHN GAVIN,
Miller Building,
Yakima, Washington,

Attorney for Petitioner-Appellant
(Scott Publishing Company).

THOMAS MALOTT,
708 Spokane and Eastern Building,
Spokane, Washington,

Attorney for Trustee-Appellee.

In the District Court of the United States for the Eastern District of Washington, Southern Division

In Bankruptcy No. B-1544

In the Matter of:

MID-COLUMBIA PUBLISHERS, INC., a Corporation,

Bankrupt.

ORDER UPON REVIEW

The above matter having come on regularly for hearing before the above-entitled Court, the Hon. William J. Lindberg, District Judge, presiding, upon the petition of Scott Publishing Company, a corporation, for review of the Findings of Fact, Conclusions of Law, and Order of the Hon. Michael J. Kerley, Referee in Bankruptcy, of the above-entitled Court, by virtue of which Findings, Conclusions, and Order of said Referee, on March 3, 1954, denied the petition of said Scott Publishing Company, a corporation, for the disbursement to it of the sum of $8,550.00 by the Trustee from the assets of the above bankrupt estate, and the Referee having filed the record of said proceedings in the above-entitled Court, and the Court having all of the records of the above-entitled bankrupt estate and the records of the proceedings sought to be reviewed before it, and having considered same, the Trustee appearing by and through his counsel of

record, Thomas Malott, and the petitioner appearing by its executive officer, Glenn Lee, and by one of its counsel of record, John Gavin, and argument of counsel having been heard, and the Court having taken the matter under consideration and having filed herein its Memorandum of Opinion on review in which the Court concluded that the said Findings of Fact, Conclusions of Law, and Order of the Referee should be approved and affirmed, and the Court being now fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the Findings of Fact, Conclusions of Law and Order of the Referee entered herein [1*] on March 3, 1954, upon the petition of the Scott Publishing Company, a corporation, for the restitution of the sum of $8,550.00 from the assets of the bankrupt estate shall be, and the same hereby are, approved and affirmed, and

It Is Further Ordered, Adjudged and Decreed that the petitioner, Scott Publishing Company, shall be, and it hereby is, allowed an exception to this order.

Dated this 19th day of February, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ THOS. MALOTT,
Attorney for Trustee.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Approved as to Form:

/s/ JOHN GAVIN,
Of Counsel for Petitioner,
Scott Publishing Company.

Affidavit of Mail attached.

[Endorsed]: Filed February 21, 1955. [2]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Scott Publishing Company, a corporation, petitioner in the above-entitled matter, appeals to the Court of Appeals for the Ninth Circuit from that certain Order Upon Review entered in this matter by the Honorable William J. Lindberg, United States District Judge, on February 19, 1955, which said Order was entered by the Clerk on February 21, 1955, by virtue of which the Findings of Fact, Conclusions of Law, and Order of the Referee, Honorable Michael J. Kerley, were approved and affirmed and which said Order Upon Review and Findings, Conclusions, and Order of the Referee thereby approved deny the disbursement to the petitioner of the sum of $8,-550.00 from the assets of the above bankrupt estate to which petitioner claimed that it was entitled by way of restitution.

Dated this 14th day of March, 1955.

GAVIN, ROBINSON &
KENDRICK,

/s/ JOHN GAVIN,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed March 17, 1955. [3]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Bond No. 243490

Know All Men by These Presents:

That we, Scott Publishing Company, a corporation, the appellant above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Ralph Rodgers, Trustee of the above bankrupt, and the United States of America in the just and full sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said Ralph Rodgers, Trustee, his successors, executors, administrators and assigns, and for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of March, 1955.

The Condition of This Obligation Is Such, That,

Whereas, in a proceeding in the above-entitled bankruptcy in the above-entitled Court the petitioner, Scott Publishing Company, a corporation, sought review by said Court of certain Findings, Conclusions and Order of the Referee in Bankruptcy in which said Referee denied said petitioner the right to recover from the assets of the bankrupt estate the sum of $8,550.00, to which petitioner alleged it was entitled by way of restitution, and

Whereas, upon review of said action of the Referee the above-entitled Court, Honorable William J. Lindberg, District Judge, did enter a certain Order Upon Review affirming and approving the action of the Referee and declining to order the Trustee herein to disburse said sum to the petitioner, which said order was signed by said Court on February 19, 1955, and entered by the Clerk on the Docket on February 21, 1955, and

Whereas, the said petitioner, Scott Publishing Company, a corporation, has filed a Notice of Appeal from such Order Upon Review of the above-entitled Court to the United States Court of Appeals for the Ninth Circuit,

Now, Therefore, the condition of this obligation is such that if the said Scott Publishing Company, petitioner, shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed, or the

Order Upon Review and Judgment of the above Court affirmed, or such costs as the said Court of Appeals may award against the said Scott Publishing Company if the judgment or order is [4] modified, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] SCOTT PUBLISHING COMPANY,

By /s/ GLENN C. LEE,
Sec.-Treas.

[Seal] UNITED PACIFIC INSURANCE COMPANY,

By /s/ ROBERT E. TENNEY,
Attorney-in-Fact.

Attest:

/s/ R. C. GILBERT,
Vice Pres.

United Pacific Insurance Company
Fidelity and Surety Department
Seattle 14, Washington

No. 92

POWER OF ATTORNEY

Know All Men by These Presents:

That the United Pacific Insurance Company, a corporation of the State of Washington, having its principal offices in the city of Tacoma, Washington,

pursuant to the authority granted by Article IV, Section 8, of its Bylaws, which reads as follows:

"The President, or any Vice President, of this Corporation, in concurrence with the Secretary, or any Assistant Secretary, shall have authority to appoint Resident Vice Presidents, Resident Assistant Secretaries and Attorneys-in-Fact, as the business of the Company may require, and to authorize them, and each of them, to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases or mortgages, contracts, agreements and policies and to affix the seal of this corporation thereto, or to exercise any lesser number of the powers hereinbefore set forth,"

does hereby nominate, constitute and appoint Robert E. Tenney of Yakima, Washington, its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, any and all bonds and undertakings of suretyship.

The execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Tacoma, Washington, in their own proper persons.

In Witness Whereof, the United Pacific Insurance Company has caused these presents to be signed by its President and its corporate seal to be hereto

affixed, duly attested by its Assistant Secretary, this 26th day of May, 1942.

[Seal] UNITED PACIFIC
INSURANCE COMPANY,

By J. W. REYNOLDS,
President.

Attest:

H. L. BAIRD,
Assistant Secretary.

State of Washington,
County of King—ss.

On this 26th day of May, 1942, before me personally came J. W. Reynolds, to me known, who, being by me duly sworn, did depose and say, that he is President of the United Pacific Insurance Company, the corporation described herein which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Seal] JOE PRICE,
Notary Public.

State of Washington,
County of King—ss.

I, Morris E. Brown, Assistant Secretary of the United Pacific Insurance Company, do hereby certify that the foregoing is a true copy of Article IV, Section 8, of the Bylaws of said Company, and is now in force; and I do hereby certify the above and foregoing Power of Attorney is a true and correct copy of a Power of Attorney, executed by said United Pacific Insurance Company, which is still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Company at the City of Seattle this 14th day of March, 1955.

[Seal] /s/ MORRIS E. BROWN,
Assistant Secretary.

Affidavit of Mail attached.

[Endorsed]: Filed March 17, 1955. [6]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

It is hereby stipulated and agreed by and between the parties hereto that the time for the filing of the record and docketing of the appeal in this matter in the United States Court of Appeals for the

sought from the defendant by the plaintiff Trustee was a certain Model 34 Mergenthaler linotype machine which had been purchased by the bankrupt Mid-Columbia Publishers and was then in the possession of the defendant, Scott Publishing Company, Inc.

That said action came on for trial, and during the course thereof it was stipulated that the corporation had given a note and chattel mortgage in partial payment of the linotype machine and that the balance owing upon the purchase of said linotype machine at the date of the alleged conversion, that is June 11, 1949, was $8,550. That prior to the bringing of the conversion action, the Trustee sought to recover possession of this linotype machine, but [9] the Scott Publishing Company refused his demands for possession and he sued in conversion for the full market value of the machine.

That during the course of the conversion action in the Superior Court of the State of Washington, the trial judge ruled and instructed the jury that the Trustee in the action as a matter of law could only recover the market value of the linotype machine, less the amount of mortgage indebtedness thereon in the sum of $8,550, admittedly due at the date of conversion.

That during the course of the trial of said conversion action in the Superior Court, the Scott Publishing Company did not show that it had assumed the mortgage indebtedness due upon the

linotype and had been and was paying said indebtedness. That said action was tried during the month of March, 1952.

That the trial of the conversion action resulted in a verdict in favor of the Trustee in Bankruptcy, and against the Scott Publishing Company, Inc., in the amount of $22,033. That by its answer to a special interrogatory propounded by the trial court, the jury found that the Trustee in Bankruptcy was entitled to recover the market value of the Mergenthaler linotype in the sum of approximately $14,000, less the amount of the $8,550 mortgage indebtedness due thereon. Judgment was entered in favor of the Trustee and against the Scott Publishing Company, Inc., and it appealed from the judgment. The trustee cross-appealed from the failure of the court to add $8,550 onto the judgment rendered, asserting that the Trustee was entitled to recover the full market value of the Mergenthaler linotype converted, and that the converter was not entitled to have the mortgage indebtedness deducted therefrom.

This cause was argued and determined on appeal by the Supreme Court of the State of Washington, in its cause No. 32161 [10] by a Departmental Opinion filed February 24, 1953, which opinion is reported in 42 Wash. 2d 89, 253 Pac. 2d 925, and a true and correct copy thereof is attached hereto and incorporated herein by reference.

That said Opinion, in substance, affirmed the judgment of the trial court upon the appeal of Scott

Publishing Company, and sustained the Trustee's cross-appeal and directed that the sum of $8,550 mortgage indebtedness be added to the judgment, for the reasons ascribed in its Opinion, which is attached hereto.

The Scott Publishing Company filed a petition for rehearing in the Supreme Court of the State of Washington, urging, among other things, that the effect of the granting of the cross-appeal was to wrongfully deprive the appellant, Scott Publishing Company, of the sum of $8,550 and unjustly enrich the Trustee to that extent, and petitioning that the court remand the cause, if necessary, to the trial court to permit the taking of evidence to establish that Scott Publishing Company had assumed and agreed to pay the mortgage, was paying same, and would pay same. This petition for rehearing was denied by the Supreme Court of the State of Washington on April 7, 1953.

Judgment, pursuant to the remittitur of the Supreme Court was thereafter entered in the Superior Court of the State of Washington for Franklin County, and was thereafter paid by the Scott Publishing Company, Inc. Scott Publishing Company, Inc., then filed a verified petition in the above bankruptcy proceeding on April 25, 1953, praying for recovery from the bankrupt estate of the sum of $8,550 on the grounds that it was entitled to restitution therefor, and that the bankrupt estate had been unjustly enriched to the extent of the sum of

$8,550. Said petitioner alleged that it had assumed and agreed to pay the mortgage indebtedness due upon the Mergenthaler linotype, was paying and would pay same, and was [11] willing to hold the Trustee harmless from any liability therefor.

That the Trustee answered said petition, generally denying the right of the petitioner, Scott Publishing Company, to restitution and asserting that the proceedings in the State courts, as set forth above, were res adjudicata of the petition of Scott Publishing Company. A reply was interposed by the petitioner and a motion to dismiss the petition was also interposed by the Trustee. Upon the issues joined by these pleadings, the matter was tried and heard by the Honorable Michael J. Kerley, Referee in Bankruptcy of the above-entitled court.

That said matter was heard upon the records of the State court proceeding and oral evidence, and that evidence was offered by the petitioner that it had assumed and agreed to pay the mortgage indebtedness on the Mergenthaler linotype, and had reduced it at said time to the sum of $3,150, and that it would continue to pay all payments due on account of said indebtedness, and save the Trustee harmless therefrom. That evidence was also offered by the Trustee that the evidence that it had assumed and agreed to pay and would pay said indebtedness was within the knowledge of and known to the petitioning Scott Publishing Company prior to, during, and at the time of the trial of the conversion action in the State courts.

That the Referee in Bankruptcy entered Findings, Conclusions, and an Order dismissing the petition of Scott Publishing Company, Inc., for restitution of the sum of $8,550, all as more fully set forth in said document, a true and correct copy of which is attached hereto and made a part hereof by reference. That in substance, said Referee found as a matter of fact and a matter of law that the judgment of the Superior Court of the State of Washington as modified on appeal by the Supreme Court of the State of Washington was res adjudicata of the rights of petitioner, and that the matters and things alleged in its petition in this proceeding were [12] matters that should and could have been adjudicated in the State court proceedings, and that these bankruptcy proceedings constituted a collateral attack upon the State court judgment, that the petitioner was not entitled to equitable relief, and that the petition should be dismissed.

Thereafter, the petitioner, Scott Publishing Company, duly and properly petitioned for a review of the determination of the Referee by the above-entitled court, and the matter duly and regularly came on for hearing before the Honorable William J. Lindberg, United States District Judge, one of the judges of the above-entitled court, who had before him the entire record of the bankruptcy proceedings and the record of the hearing before the Referee in Bankruptcy. The matter was argued to said judge and taken under advisement, and he

thereafter filed a certain Memorandum Opinion, a true and correct copy of which is attached hereto and made a part hereof by reference. That said Memorandum Opinion in substance affirmed and approved the Findings, Conclusions and Order of the Referee in Bankruptcy.

That pursuant to said Memorandum Opinion, an Order was entered hereby by said judge on February 19, 1955, and filed on February 21, 1955, approving and affirming the Findings, Conclusions and Order of the Referee. From said Order and Judgment, Notice of Appeal was filed by petitioner, Scott Publishing Company, Inc., on March 14, 1955, and a bond on appeal was filed. Certified copies of the Order and Judgment appealed from, the Notice of Appeal and of the bond are attached to and transmitted with this agreed Statement of Facts as part of the record on appeal.

Statement of Points

The points involved upon this appeal and which are to be determined under the foregoing agreed Statement of Facts are as follows: [13]

1. Is the Scott Publishing Company, petitioner, entitled to restitution of the sum of $8,550 from the bankrupt estate on the grounds that the bankrupt estate has been unjustly enriched to that extent at the expense of the petitioner?

2. Is the Scott Publishing Company, by reason of its conversion of the Mergenthaler linotype, in a

position to obtain equitable relief in these proceedings?

3. Is the judgment of the Superior Court of Franklin County, Washington, as modified on appeal by the Supreme Court of the State of Washington, res adjudicata of the right of the petitioner to recover any sums from the Trustee by these proceedings?

4. Do these proceedings involve matters which could and should have been adjudicated and determined by the State court proceedings?

5. Do these proceedings constitute an attempted collateral attack upon a valid and subsisting judgment of the Superior and Supreme Courts of the State of Washington?

With respect to the foregoing Statement of Points, it is the position of the appealing petitioner that it is entitled to restitution of $8,550. and that the bankrupt estate has been unjustly enriched at its expense in that amount; it is not barred from this equitable relief by any conduct on its part; that the judgments of the courts of the State of Washington are not res adjudicata of its right to recover in these proceedings; that these matters, particularly a showing of assumption of the mortgage indebtedness on the linotype, and payment thereof by it, should not or could not have been determined in the State court proceedings, and the favorable ruling of the trial court made it unnecessary to make any such showing; and that these proceedings are not a

collateral attack upon a judgment of the State courts of Washington. It is the position of the respondent Trustee, on the other hand, that the petitioning appellant is not entitled to restitution on the grounds of unjust enrichment, that it does not come into court with clean hands entitling it to relief in an equitable proceeding, that the judgment [14] of the State courts is res adjudicata of the claims of petitioner, that these matters could and should have been litigated in State court actions, and that these proceedings do constitute a collateral attack upon a valid judgment of the State courts, and that the petition was rightfully dismissed.

In Witness of this Stipulation, the attorneys of the respective parties hereto have executed these presents this 27th day of April, 1955.

/s/ JOHN GAVIN,

Of Counsel for Petitioner, Scott Publishing Company, Inc., a Corporation.

/s/ THOMAS MALOTT,

Counsel for Ralph Rodgers, Successor to Ernest R. Crutcher as Trustee in Bankruptcy for Mid-Columbia Publishers, Inc.

The foregoing Agreed Statement on Appeal conforms to the truth, is a proper Agreed Statement on Appeal pursuant to Rule 76 of the Federal Rules of Civil Procedure, is approved by the Court, and is herewith certified to the United States Court of

Appeals for the Ninth Circuit as the record on appeal herein.

Dated this 3rd day of May, 1955.

/s/ WILLIAM J. LINDBERG,
District Judge. [15]

In the Supreme Court of the
State of Washington

No. 32161
Department Two

ERNEST R. CRUTCHER, as Trustee in Bankruptcy,

Respondent and Cross-Appellant,

vs.

SCOTT PUBLISHING COMPANY, INC.,

Appellant.

OPINION

Cross-appeals from a judgment of the superior court for Franklin County, Ott, Jr., entered April 11, 1952, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Affirmed on the defendant's appeal; remanded on the plaintiff's cross-appeal.

Moulton, Powell, Gess & Loney and Gavin, Robinson & Kendrick, for appellant.

Thomas Malott, for respondent and cross-appellant.

Hill, Jr.—Respondent, trustee in bankruptcy for Mid-Columbia Publishers, Inc., hereinafter referred to as Mid-Columbia, brings this action for the conversion of a newspaper plant and equipment and the consequent destruction of the profitable portion of the then going business of the now bankrupt corporation.

Ralph E. Reed for many years owned and published, in Kennewick, the Courier-Reporter, a weekly newspaper, hereinafter referred to as the Courier, and operated a job printing business in connection therewith. In 1945, Reed entered into a contract to sell the newspaper and the printing business, the plant and all equipment, to E. Earl Allen and Rolfe W. Tuve for twenty-five thousand dollars. Tuve soon thereafter acquired the interest of Allen. The contract provided, inter alia, that payments of five thousand dollars and interest were to be made to Reed on June 1, 1945, and "the first day of the first month of each quarter thereafter." It provided, further: [16]

> "9. Time is of the essence of this agreement, and in the event that the buyers shall fail to make any of said payments or any part thereof at the times hereinbefore fixed therefor, or shall suffer or permit any of said goods or chattels to be taken from the buyers' possession or removed from 217 Kennewick Avenue, Kennewick, Washington, or shall make default in any of the conditions above stated, or if at any time the seller shall feel insecured, then this contract may be

> forthwith terminated, at the option of the seller, without notice, and the seller shall thereupon be entitled to the immediate possession of all said property wherever situated. And all payments theretofore made to the seller by the buyers shall be retained by the seller as the seller's own property, as compensation for the use and wear and depreciated value of said goods and chattels, and for the seller's loss and trouble."

In 1948, Tuve and his wife organized the Kennewick Printing Company, Inc., a corporation, and Tuve transferred his interest in all of the property covered by the Reed-Tuve contract to the corporation, including his interest in the contract. (The jury established this point by its answer to a special interrogatory.)

Early in 1949, Tuve and some associates launched a venture which envisioned the acquiring of several weekly newspapers in neighboring communities and the starting of a weekly newspaper in Pasco, with the expectation that it might ultimately become a daily. To implement that project, the articles of incorporation of the Kennewick Printing Company, Inc., were amended, its name being changed to Mid-Columbia Publishers, Inc., and the number of shares of preferred stock being substantially increased.

With all of the Tuve interest in the Reed-Tuve contract vested in Mid-Columbia (formerly the Kennewick Printing Company, Inc.), and all of the personal property covered by that contract in its pos-

session, we came to the critical days of June 11 and 12, 1949. It should be noted that a large linotype machine costing approximately fifteen thousand dollars installed, and certain other equipment which had been acquired subsequent to the Reed-Tuve contract and to which Reed had no claim or title, were in the Kennewick plant. [17]

Mid-Columbia, utilizing the facilities in the Kennewick plant, had begun publication of a newspaper known as the Pasco Empire. This venture proved a heavy drain on the resources of Mid-Columbia, and on Saturday, June 11, 1949, the corporation could not meet the payroll at the Kennewick plant. (Some checks in payment of the two preceding payrolls had been returned "N.S.F." but, on being presented at the bank a second time, had been honored.)

On that date, at a meeting in Pasco of those interested in Mid-Columbia, in which meeting Reed participated, one of the subjects of discussion was the acquisition of Reed's interest in the Courier and the Kennewick plant and equipment. Reed at that time appeared to be concerned chiefly about the fact that the payroll had not been met. He made no demand for the five hundred dollars due by the terms of the contract on June 1st, which had not been paid. (Mrs. Tuve testified that there was an agreement that payments were to be made on the fifteenth instead of the first of the month, and other evidence indicated that payments usually were made after the first and by the fifteenth.) One of the men pres-

ent advanced more than one thousand dollars to meet the payroll and Reed apparently was satisfied with that development. He seemed content with a proposal that he meet with the group again to consider some basis upon which Mid-Columbia could acquire his interest in the contract.

Reed testified that, although he indicated at the meeting at Pasco Saturday afternoon certain terms and conditions under which he might be willing to dispose of his interest in the Courier and the printing plant, he made no definite commitments. He testified, further, that after he left the meeting he became so convinced of his insecurity under the contract that he went directly to the Courier office in Kennewick, and there told the employees that their checks would come in, and told Mrs. Tuve that he would have to take the business back. He testified, further, that, [18] while he was talking to Mrs. Tuve, Mr. Tuve came in and Mrs. Tuve advised him of what Reed had just told her, and that neither of them voiced any objection or protest. Reed fixes the time of this repossession at about seven p.m. Both Mr. and Mrs. Tuve deny any meeting with him in the Courier office at that time.

Mr. Tuve testified that he did not return to Kennewick following the meeting in Pasco until after ten p.m. Mrs. Tuve testified that she saw Reed's car outside the Courier office at five-thirty or six o'clock that evening and supposed Reed was in it, but that he did not come into the office and she did not talk to him, and that she left the office before

six-thirty p.m., and did not return that night. She testified, further, that sometime between eleven and eleven-fifteen that night, Reed called her at home and told her that he had sold the contract to Lee (Glenn C. Lee, one of the officers of the Scott Publishing Co., Inc.).

The jury apparently did not accept the Reed version of the repossession, for in answer to a special interrogatory, it found that he never made a valid repossession of the property described in the Reed-Tuve contract.

Reed testified, further, that about eight-thirty that same evening he called his attorney and asked whether there was anything that would prevent his selling "the shop" and was advised that there was not. He thereupon contacted Lee and met him at the office of the appellant at about nine or nine-thirty that night. There, without benefit of counsel, Reed and Lee arrived at an agreement and Lee typed the following document, which both parties signed:

> "This is a memorandum and agreement between Ralph E. Reed and the Scott Publishing Co., Inc.
>
> "Ralph E. Reed is the holder and owner of a Seller's contract to Rolphe Tuve, which contract is in default, because of non payment June 1st, 1949, by Tuve of the payment and interest due. This contract covers the sale by Reed to Tuve of the Kennewick Courier Reporter and Printing Co.

"By such default, Reed is again in possession by law, as owner of the property. [19]

"Reed desires to sell his ownership in the above-mentioned contract to the Scott Publishing Co., Inc. Glenn C. Lee, Sec. Treas, of the Scott Publishing Co., acting for the corporation, has evinced his desire to buy the contract and Reed's position as it now stands * * *

"The intent and action on the part of Reed is to sell his interest and ownership in the contract and in the Kennewick Courier Reporter and Printing Co., and the intent and action on the part of Lee, acting for the Scott Publishing Co., Inc., is to buy said interest and ownership.

"Therefore by the signing and witnessing of this agreement, Reed sells, and Lee buys, above-mentioned interests and ownership."

The purchase price, not mentioned in the typewritten "memorandum and agreement," was fifteen thousand dollars, of which five hundred dollars was paid by Lee that night. (The balance due Reed on the Reed-Tuve contract was $12,150.)

Reed testified that he went directly home after his meeting with Lee, and stayed there.

Several witnesses testified that that same night, about eleven p.m., Reed went to the Courier office and told a group gathered there, including Tuve, who arrived later, that he had sold his interest in the Reed-Tuve contract to Glenn Lee. It is apparent that

there is a vast difference between the transaction as those witnesses understood Reed to say it was (i.e., that he had sold his interest in the contract) and the transaction as Reed and Lee understood it (i.e., that Reed had repossessed the property and sold the repossessed property to Lee).

Early the next morning (Sunday), representatives of the appellant took possession of the Courier office and the printing plant. Locks were thereafter changed on the doors; the windows were barred; a man armed with a shotgun was placed on the premises.

The five-hundred-dollar payment and accrued interest due June 1st by the terms of the Reed-Tuve contract was tendered to both Reed and Lee on June 15th, and was refused. Its principal asset gone, Mid-Columbia was soon in bankruptcy, and the [20] trustee in bankruptcy brought this action for the conversion of the corporation's property and the damages resulting therefrom. The jury brought in a verdict of $22,033 for the trustee in bankruptcy, and the Scott Publishing Co., Inc., appeals. The trustee cross-appeals, contending that an offset of $8,550 against the judgment should not have been allowed.

(1) Contrary to appellant's contention, the transfer by Tuve of his interest in all of the property covered by the Reed-Tuve contract to the Kennewick Printing Company, Inc., a corporation, did not have to be evidenced by a writing. The trial court

correctly stated the law when it advised the jury that the interest of Tuve in the Reed-Tuve contract could be assigned orally; that any language, however informal, which shows the intention of the owner of a right or interest in property to transfer it, will be sufficient to vest the property in the assignee; and that, in determining whether such an assignment had actually been made, the jury was entitled to take into consideration the actions of the parties with reference thereto, as well as all the circumstances attending the alleged assignment. Seattle Nat. Bank v. Emmons, 16 Wash. 585, 48 Pac. 262 (1897); Morehouse v. Spokane Security Finance Corp., 175 Wash. 501, 27 P. (2d) 697 (1933); 4 Am. Jur. 287,290, Assignments, §§ 74, 77; Restatement, Contracts, § 157. Nor does RCW 65.08.040 (cf. Rem. Rev. Stat., § 5827), requiring the recording of bills of sale, have any bearing on the question. That provision of the section cited is for the benefit of two classes of persons, existing creditors and innocent purchasers. Morehouse v. Spokane Security Finance Corp., supra. Appellant was neither.

(2) Appellant urges that more than a change of name was involved in the amendment of the articles of incorporation when the corporate name was changed from Kennewick Printing Company, Inc., to Mid-Columbia Publishers, Inc., that the changes really created a new corporate entity with a new purpose; and that a transfer of [21] assets from

the Kennewick Printing Company to Mid-Columbia was necessary.

The only case cited by appellant in its contention is Midland Co-Op. Wholesale v. Range Co-Op. Oil Ass'n. 200 Minn. 538, 274 N.W. 624, 111 A.L.R. 1521 (1937), in which the court construed a Minnesota statute and said:

> "The statute permitting amendments clearly implies that the amendments should not change the nature or character of the business * * * The statute does not authorize fundamental changes."

Our own statute on amendments, which is part of the business corporations statute of 1933, provides:

> "A corporation at a meeting of the shareholders duly called upon notice of the specific purpose, may amend its articles in any respect so as to include any provision authorized by this title * * * " RCW 23.12.060; cf. Rem. Rev. Stat. (Sup.), § 3803-37.

As indicated, the only amendments in this changed the name of the corporation and increased the number of shares of preferred stock. No new corporation was created under our statute. Appellant's assignments of error dealing with this phase of the case are without substance.

That the actions of the appellant in taking possession of the newspaper office and printing plant constituted high-handed seizure of a new Mergen-

thaler linotype machine and other equipment installed in the Kennewick plant and subsequent to the Reed-Tuve contract and to which Reed had no claim, there can be no doubt. Whether or not there was a conversion of the property covered by the Reed-Tuve contract is the primary issue presented on this appeal. There was such a conversion unless Reed or the appellant had a right to repossess the property and, in furtherance of that right, did repossess it.

The claimed right of repossession is twofold: (1) the failure to make the payment due June 1st, which it will be noted is the only reason referred to in the agreement between Reed and the appellant for Reed's having repossessed the property, and [22] (2) the fact that the seller (Reed, or the appellant as his assignee) felt insecure.

As to the first, the jury could have found that there was an oral agreement that the payment could be made on the fifteenth rather than the first of the month. Even if there was no such agreement, the jury was entitled to find that the seller, by regularly accepting payments between the first and the fifteenth of the months in which they were due, had, temporarily at least, waived the right to terminate the contract for failure by the purchaser to make the payment on the first day of June.

(3) After such a waiver, in order to reinstate the original terms of the contract, the seller must give notice of his intention thereafter to demand strict

compliance with the terms of the contract and must allow the purchaser a reasonable opportunity to comply. In Lundberg v. Switzer, 146 Wash. 416, 263 Pac. 178, 59 A.L.R. 131 (1928), we said:

> "The appellants cite a long line of cases from this and other courts holding that the right of forfeiture cannot be exercised without demand and a reasonable opportunity to comply after there has been a waiver of strict performance by the acceptance of delayed payments. About this rule there is no controversy, as it is firmly written into the law."

Cunningham v. Long, 134 Wash. 433, 235 Pac. 964 (1925); Beardslee v. North Pac. Finance Corp., 161 Wash. 613, 44 P. (2d) 186 (1935); Franklin v. Gilbert Ice Cream Co., 191 Wash. 269, 71 P. (2d) 52 (1937); Knoblauch v. Sanstrom, 37 Wn. (2d) 266, 223 P. (2d) 462 (1950); Restatement, Contracts, § 300.

In the present case, the trial judge charged the jury, by instruction No. 14:

> "You are instructed that the remedies given to a seller under a conditional sales contract, upon default by the buyer, are for the seller's own benefit and when he knows of such default he may waive the default, either expressly or impliedly. A seller may either expressly or impliedly waive his right to insist upon strict compliance with the terms of said contract. The default of a buyer may be waived by the seller

subsequently treating [23] the contract as still in force and such action is a waiver of the right to forfeit the contract. *Such a course of conduct will bar the seller's right to assert a forfeiture for any payment not made at the time stated in the contract unless prior thereto he has given notice to the buyer that he intends to hold him to the original terms and the buyer has had a reasonable opportunity to comply with such notice.* You are instructed that if you find by a fair preponderance of the evidence that the seller had waived the default or defaults, if any, by the buyer he is under the necessity of giving notice to the buyer and a reasonable opportunity for the buyer to cure his default or defaults before forfeiture and repossession can be claimed." (Italics ours.)

Under the facts in this case, instruction No. 14 stated the law with reference to waiver of defaults by a seller and was clearly applicable to the claimed right of repossession based on the failure to make the June 1st payment or on the removal of certain of the property from the premises, and was proper.

Appellant urges that the jury might have concluded therefrom that notice was a requisite to repossession if the seller felt insecure. Repossession on the ground of insecurity was covered by instruction No. 11, which contained no reference to waiver, and there is no reason to suppose that the jury applied instruction No. 14 to the claim of a right to

repossession on the basis of insecurity. We find no error in the giving of instruction No. 14.

(4) Appellant places greatest reliance upon the proposition that Reed (or the appellant as his successor in interest in the contract) was entitled to take possession of the property covered by the contract because he deemed himself insecure.

The property was not mobile and capable of easy removal; it was not being destroyed, secreted, or moved away. The seller's security would have been imperiled by a failure to publish the Courier on the following Thursday, in which event the Courier would have lost its status as a legal newspaper and its second-class mailing privilege. However, the payroll problem apparently had been solved for the time being and there was no showing which [24] would enable the court to say that there was, as a matter of law, justification for seizure Sunday morning, June 12, 1949, without giving the contract purchaser an opportunity to demonstrate that the Courier could and would continue to be published.

The instruction given on the right to repossess without notice in the event the seller felt insecure was, we feel, very favorable to the appellant. The jury was told that if the seller acted reasonably and not arbitrarly, and if there existed proper cause to apprehend some loss to his security or if the buyer had committed or was about to commit some act that would tend to impair his security, the seller could, without notice, terminate the contract and take immediate possession of the property.

The jury found, as we have pointed out, that Reed never did repossess the property. It could also have believed that by a desire to keep the Courier out of the control of Pasco people and to make a profit of almost three thousand dollars, rather than by a feeling of insecurity.

We note an unwarranted assumption by appellant that if there was a conversion it was an ordinary and not a wilful conversion. This assumption is based upon a statement in Glaspey v. Prelusky, 36 Wn. (2d) 592, 219 P. (2d) 585 (1950). We there discussed one situation that constituted a wilful conversion, but did not attempt to give an inclusive definition. We did say that an ordinary conversion is one that is unintentional and inadvertent, which is far from the situation in the present case.

One of appellant's assignments of error is that the trial court should have held that Mid-Columbia had no right or title to the newspaper or the property in the printing plant because in 1946 Tuve secured a three-thousand-dollar loan from one Henry Smith, pledging as security an assignment of his interest in the Reed-Tuve contract. The note and assignment were held in escrow in a Kennewick bank, with instructions whereby the assignment was to be delivered to Smith only if Tuve defaulted in the payments [25] due on the note and Smith deposited with the bank.

> "* * * a Notice showing Five (5) days' notice of his intention to claim default in this agreement

> and service of the same upon the said Rolfe W. Tuve at Kennewick, Washington, but if such demand is so made, and proof of service of said demand so filed with you (the bank), in (sic) the said payments should not have been made through your bank within five (5) days from the service of said notice, then the provisions of this Agreement shall be executed forthwith, without further notice to any party."

Tuve had not made all the payments required by the note, but prior to the events of June 11 and 12, 1949, Smith had indicated no intention of taking action to enforce his rights. On June 23, 1949, the required five-day notice, signed by Smith, was served on Tuve. Tuve made no payments after the service of the notice, and at the termination of five days the note was canceled and returned to Tuve and the assignment of the Reed-Tuve contract was delivered to Glenn C. Lee, as assignee of all of Smith's interest in the contract, Lee, as assignee of all of Smith's interest in the contract, Smith having assigned his interest to Lee by instrument dated June 22, 1949, which recited:

> "Whereas, the escrow instructions with which said contract and assignment were delivered, have been performed and the pledge of said contract has been foreclosed."

Appellant seeks to set up the title thus secured as a defense to the conversion action.

(5) Mid-Columbia's right of action accrued June 12, 1949. Neither Smith nor the appellant had any title at that time by virtue of the assignment. The appellant acquired nothing by virtue of Smith's assignment to Lee (so far as this action is concerned) except the possible right to offset the balance due on the Smith note against the damages for which the appellant was responsible. See Burnett v. Edw. J. Dunnigan, Inc., 165 Wash. 164, 4 P. (2d) 829 (1931); Helf v. Hansen & Keller Truck Co., 167 Wash. 206, 9 P. (2d) 110 (1932). That offset was allowed.

(6) We are convinced that the jury correctly determined that there was a conversion by the appellant and there was no [26] evidence to support any theory that appellant was merely in possession of property converted by some one else.

(7) This was conversion of a character that rendered the making of a demand unnecessary. As we said in Hill's Garage v. Rice, 134 Wash. 101, 107, 234 Pac. 1023 (1925):

> "In any event, a demand was unnecessary either for the property or for damages as for its conversion, in view of the defendant's claim of ownership thereof. The defendant's attitude in this controversy from the very beginning absolutely negatives the necessity for a demand. It is conclusively shown that a demand would have been unavailing in view of the defendant's claim of ownership of the property and his defense of this action upon the merits."

See, also, Richardson v. Great Western Motors, 109 Wash. 324, 187 Pac. 333 (1920); Burnett v. Edw. J. Dunnigan, Inc., supra; Kohout v. Brooks, 185 Wash. 4, 52 P. (2d) 905 (1935).

We now turn to the issues raised as to the amount of the damages.

(8) There is no merit in appellant's contention that the court erred in permitting a trial amendment asking damages for the destruction of a going business. This amendment was made without objection or exception. While it is true that, because of the expansion into the Pasco area, Mid-Columbia was operating at a loss, the jury could have found that the Courier and the job printing business in Kennewick constituted an established and profitable business. We have heretofore recognized that a recovery can be had in a conversion case for damages to an established business. Seeley v. Peabody, 139 Wash. 382, 247 Pac. 471 (1926).

We think that a wrongdoer cannot take over the valuable and profitable part of a corporation's business and thereby stop its total operation and then, because the corporation in its total operation was losing money, say there is no liability. The nature of the case is such as the wrongdoer has chosen to make it. There was evidence that any loss being sustained by Mid-Columbia was not due to lack of profit in the operation of the Kennewick Courier and [27] the job printing business in that city. The market value of that newspaper and the printing business.

including the plant and all physical equipment, was set at fifty to fifty-five thousand dollars by one expert witness; Tuve placed a much higher value on it. The jury allowed $27,974 on the equipment taken and $17,000 for the damage and destruction of the business. The verdict was well within the evidence.

Appellant's complaint against an instruction warning the jury against quotient verdicts (and describing them) is without semblance of merit. There was no question of a quotient verdict here. The instruction began, "If you should find that the plaintiff is entitled to a verdict . . ." It cannot justifiably be said, as asserted by appellant, that such an instruction was an invitation to return a verdict for the plaintiff. The instruction was unnecessary but certainly not prejudicially erroneous.

We are satisfied that, on appellant's appeal, the judgment should be affirmed.

Respondent cross-appeals because the appellant was allowed to set off $8.550 which remained unpaid on the mortgaged Merganthaler linotype machine against the $14,974 found to be the amount of damage for the conversion of the equipment not included in the Reed-Tuve contract.

(9) We think respondent's point is well taken. A person who is entitled to bring an action for a conversion, although he has a limited interest in the property converted, may, as against a stranger, recover the full value of the property. Hadley Warehouse Co. v. Broughton, 126 Wash. 356, 218 Pac.

257 (1923); Burnett v. Edw. J. Dunnigan, Inc., supra; Anstine v. McWilliams, 24 Wn. (2d) 230, 163 P. (2d) 816 (1945); Angell v. Lewistown State Bank, 72 Mont. 345, 232 Pac. 90 (1925); 53 Am. Jur. 907, Trover and Conversion, § 121.

In Corey v. Struve, 170 Cal. 170, 149 Pac. 48 (1915), the supreme court of California said: [28]

> "The rule that the owners of a special interest in property may recover only to the extent of such interest applies only to cases where the suit is brought against the owner of the remaining interest or his assignee."

The question of settlement between appellant and the third person who also owns an interest in the property is not before the court. Messenger v. Murphy, 33 Wash. 353, 74 Pac. 480.

If appellant wanted credit for $8,550 on the judgment, it had the burden of showing that it had paid that amount or had exonerated Mid-Columbia from all liability therefor; and that appellant failed to do. It was therefore error to offset that amount against the judgment.

It is urged that, while respondent took proper exceptions to that portion of instruction No. 29 which reads:

> "If you find for the plaintiff for any sum by reason of alleged conversion of any property not included in the Reed-Tuve contract then plaintiff is entitled to recover the fair cash

> market value of such property at the date of the alleged conversion thereof, *less any* lien indebtedness thereon." (Italics ours.)

he did not except to almost identical language in instruction No. 6, and, by reason of his failure to except thereto, the language of instruction No. 6 became the law of the case.

We do not find the same error in instruction No. 6 as in instruction No. 29, because the court said in the former:

> "In the event you find any mortgage, pledge, or lien indebtedness existed upon such property *which the defendant has either paid or assumed and agreed to pay* such sum should be deducted therefrom in order to arrive at the net amount of the recovery for the item or items, if any." (Italics ours.)

The element of the appellant's having paid or assumed and agreed to pay the mortgage, pledge, or lien indebtedness was omitted from instruction No. 29.

(10) In any event, under the rule laid down in Franks v. Department of Labor & Industries, 35 Wn. (2d) 763, 215 P. (2d) 416 (1950), and adequate exception to one of two or more instructions subject to the same error is sufficient to challenge the consideration of the trial court, which is the purpose of the exception, [29] and to bring the question here for review.

(11) Nor is the argument of appellant that we

can add the $8,550 to the judgment only as an alternative to a new trial of any force in a situation such as the present, where the set-off is a liquidated amount. If the set-off was erroneously allowed or erroneously disallowed, judgment would be automatically increased or decreased by the amount thereof. Richardson v. Great Western Motors, 109 Wash. 324, 187 Pac. 333.

The judgment is affirmed on the appeal and the case is remanded on cross-appeal, with instructions to increase the judgment by $8,550.

Schwellenbach, Hamley, Finley, and Olsen, J.J., concur.

April 7, 1953. Petition for rehearing denied.

Filed February 24, 1953, Supreme Court for the State of Washington. [30]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER DISMISSING PETITION OF SCOTT PUBLISHING COMPANY, INC.

At Spokane, in said District, March 3rd, 1954.

Scott Publishing Company, Inc., having filed herein its petition, verified the 24th day of April, 1953, and filed in this proceeding on April 25, 1953,

praying for the recovery from the bankrupt estate of the sum of $8,550.00, and issue having been joined in said proceeding, and Ralph Rodgers, the successor Trustee of Ernest R. Crutcher, having been substituted as respondent to said petition by virtue of an order dated July 25, 1953, and said mattter having come on for hearing and trial on July 23, 1953, at the hour of two o'clock p.m. of said day, at the office of the undersigned Referee, 1206 Old National Bank Building, in the City of Spokane, the petitioner, Mid-Columbia Publishers, Inc., appearing by John Gavin, of counsel for petitioner, and the Trustee appearing by his attorney, Thomas Malott, and evidence having been adduced, and the matter having been submitted to the Court, the Court does now make the following:

Findings of Fact

I.

Petitioner is a corporation, organized and existing under and by virtue of the laws of the State of Washington and has paid all license fees due and past due said state engaged in the publication [31] of a daily newspaper within the above District, maintaining its principal office at the City of Kennewick, Benton County, Washington.

II.

Ralph Rodgers is the duly appointed, qualified and acting successor trustee of Ernest R. Crutcher, who was the original trustee in bankruptcy in this

proceeding, both of whom are referred to hereinafter as the trustee.

III.

Heretofore, pursuant to authority granted by this Court, the trustee instituted an action against petitioner in the Superior Court of the State of Washington, in and for the County of Franklin, entitled "Ernest R. Crutcher, as trustee, plaintiff, vs. Scott Publishing Company, Inc., a corporation, defendant," which said cause is No. 7314 of the records of the Clerk of said Court, and after judgment had been entered in said action an appeal was taken to the Supreme Court of the State of Washington, and said cause is numbered 32161 in the Supreme Court.

IV.

The action brought by the trustee in the Franklin County Superior Court was one for the conversion of property belonging to the bankrupt estate herein. Included in the property for which the trustee sought recovery of the value thereof was a Model 1934 Mergenthaler Linotype machine, hereinafter referred to as a "linotype" or "linotype machine," claimed by the trustee to be the property of the bankrupt estate then and there in the possession of the defendant, who is the petitioner herein; that at the trial of said litigation it was stipulated, as appears at page 183 of the Statement of Facts (petitioner's Exhibit 3), that Kennewick Printing Company, which was the previous name of the corporation, Mid-Columbia Publishers, Inc., the

bankrupt, had given a note and chattel [32] mortgage to Mergenthaler Linotype Company; that at page 632 of said Statement of facts (petitioner's Exhibit 3), it was stipulated that the balance owing on said linotype on June 11, 1949, which was the date of the alleged conversion, was $8,550.00; that prior to the commencement of said action in the Franklin County Superior Court, the trustee sought to recover possession of said linotype but his demands for possession, which were made upon the petitioner, were refused; that the trustee elected to sue in conversion for the value of the machine.

V.

Approximately a year and half prior to the trial of the Franklin County Superior Court action aforesaid, the petitioner assumed and agreed to pay to Mergenthaler Linotype Company the indebtedness aforesaid of $8,550.00 which had been incurred by the bankrupt, but Mergenthaler Linotype did not then, or at any time thereafter, release or exonerate the bankrupt from liability on account of said indebtedness, but did accept and had accepted the petitioner as the obligor of such mortgage indebtedness. That the trustee did not at any time petition for or seek to sell the linotype machine either subject to or free from the lien of the mortgage. That the trial judge in the Franklin County action ruled during the trial as a matter of law that the trustee in that action could only recover the proven market value of the linotype machine, less the $8,550.00 indebtedness thereon, and so instructed the jury. No

evidence was offered as to the sums of money which the petitioner had paid the Mergenthaler Linotype Company as of the date of trial of the Franklin County Superior Court action, which action was tried in March of 1952. As of May, 15, 1953, however, the petitioner had reduced said indebtedness to the sum of $3,150. No evidence was offered by the petitioner at the trial of said Franklin County action to show the assumption of said indebtedness or what amounts, if any, it had paid Mergenthaler Linotype Company. [33]

VI.

All matters and things adduced at the hearing before this Court pertaining to the mortgage indebtedness owing to Mergenthaler Linotype Company by the bankrupt and the assumption agreement signed by the petitioner were known to the petitioner at the time of trial of said Superior Court action.

VII.

By judgment of the Superior Court in the action commenced by the trustee aforesaid, the full recovery of the value of said linotype (which was more than $8,550.00, less the amount of the bankrupt's indebtedness owing on the purchase price thereof at the time and place of the alleged conversion, to wit, the sum of $8,550.00), was granted to the trustee; that upon appeal of the said cause to the Supreme Court of the State of Washington, the judgment of the Superior Court in that respect was affirmed by the Supreme Court and, in addition thereto, the Supreme Court

of the State of Washington, by its decision and by its remittitur sent to said Superior Court, adjudged that the trustee was entitled to recover the full value of said linotype machine, without deduction for the indebtedness of $8,550, and there was added to the original judgment of the Superior Court the sum of $8,550. The trustee recovered from the petitioner the full amount of said judgment thus increased. The Supreme Court of the State of Washington filed an opinion which is reported in 142 Washington Decisions, page 80, and which by reference is incorporated in these Findings of Fact, the title of the action therein reported being designated as "Crutcher v. Scott Publishing Company, Inc."

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

1. The judgment of the Superior Court of Franklin County, Washington, as modified by the appeal to the Supreme Court of the [34] State of Washington, constitutes a final and conclusive adjudication of the rights of the trustee to recover for the conversion of said linotype.

2. The matters and things set forth in the petition of Scott Publishing Company, filed herein on April 25, 1953, were matters and things which could have been and should have been adjudicated and determined in the Franklin County Superior Court action aforesaid, and the judgment as rendered by the Superior Court of the State of Washington in

the proceedings hereinbefore referred to, constitute a final and complete adjudication of the rights of the parties in this proceedings.

3. The facts and allegations contained in the petition aforesaid of Scott Publishing Company, Inc., constitute collateral attacks upon a valid and subsisting judgment of the Superior Court of the State of Washington, for Franklin County, as affirmed and modified by the Supreme Court of the State of Washington.

4. The petitioner, having been adjudicated guilty of a wilfull tortious act and a wrongful tortious act, from which arises the claim asserted in its petition, does not come into court with clean hands and should be barred from equitable relief.

5. The petition aforesaid of Scott Publishing Company should be dismissed.

Wherefore, It Is Ordered, Adjudged and Decreed that the petition of Scott Publishing Company, Inc., filed herein on April 25, 1953, and verified on April 24, 1953, be and it is hereby dismissed, with prejudice, and it is ordered that the trustee recover his costs herein incurred.

/s/ MICHAEL J. KERLEY.
Referee in Bankruptcy. [35]

[Title of District Court and Cause.]

MEMORANDUM OPINION ON REVIEW OF REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION OF SCOTT PUBLISHING COMPANY, INC.

It is the opinion of the Court, after reviewing the whole record submitted and after fully considering the arguments and authorities submitted by counsel, that the Referee's Findings of Fact, Conclusions of Law and Order should be approved and affirmed.

The doctrine of collateral estopped by judgment, being an application of the rule of res judicata, appears to be controlling in this case. In addition to the reasoning of the Referee, set forth in his opinion appearing in the record in support of his Findings of Fact, Conclusions of Law and Order, and authorities cited by the Referee and counsel for the Trustee, the following cases are cited in support of the Court's decision in this matter:

Partmar Corp. vs. Paramount Picture Theatre Corp., 347 U.S. 89;

Heiser vs. Woodruff, 327 U.S. 726;

Baltimore S.&S. Co. vs. Phillips, 274 U.S. 316;

Reed vs. Allen, 286 U.S. 191;

Deposit Bank vs. Frankfort, 191 U.S. 199;

Lester vs. National Broadcasting Company, Inc., Court of Appeals, Ninth Circuit, Decision No. 14,188, October 12, 1954;

Restatement, Restitution—Sec. 146, page 585.

An order in accordance therewith may be submitted upon notice.

WILLIAM J. LINDBERG,
United States District Judge.

In the District Court of the United States for the Eastern District of Washington, Southern Division

In Bankruptcy No. B-1544

In the Matter of

MID-COLUMBIA PUBLISHERS, INC., a Corporation,

Bankrupt.

ORDER UPON REVIEW

The above matter having come on regularly for hearing before the above-entitled Court, the Hon. William J. Lindberg, District Judge, presiding, upon the petition of Scott Publishing Company, a corporation, for review of the Findings of Fact, Conclusions of Law, and the Order of the Hon. Michael

J. Kerley, Referee in Bankruptcy of the above-entitled Court, by virtue of which Findings, Conclusions and Order said Referee on March 3, 1954, denied the petition of said Scott Publishing Company, a corporation, for the disbursement to it of the sum of $8,550.00, by the Trustee from the assets of the above bankrupt estate, and the Referee having filed the records of said proceedings in the above-entitled court, and the court having all of the records of the above-entitled bankrupt estate and the records of the proceedings sought to be reviewed before it, and having considered same, and the Trustee appearing by and through his counsel of record, Thomas Malott, and the petitioner appearing by its Executive Officer, Glenn Lee, and by one of its counsel of record, John Gavin, and argument of Counsel having been heard, and the Court having taken the matter under consideration, and having filed herein its Memorandum of Opinion on review in which the court concluded that the said Findings of Fact, Conclusions of Law, and Order of the Referee should be approved, and affirmed, and the court being now fully advised in the premises,

It is Hereby Ordered, Adjudged and Decreed that the Findings of Fact, Conclusions of Law, and Order of the Referee entered herein on March 3, 1954, upon the petition of the Scott Publishing [37] Company, a corporation, for the restitution of the sum of $8,550.00 from the assets of the bankrupt estate, shall be and the same hereby are approved and affirmed and

It Is Further Ordered, Adjudged and Decreed that the petitioner, Scott Publishing Company, shall be and it hereby is allowed an exception to this order.

Dated this 19th day of February, 1955.

WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

THOMAS MALOTT,
Attorney for Trustee.

Approved as to Form:

JOHN GAVIN,
Of Counsel for Petitioner,
Scott Publishing Company.

[Endorsed]: Filed May 5, 1955. [38]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT

Upon the appeal of this case the appellant will rely upon and urge the following points:

1. The petitioner, Scott Publishing Company, is entitled to restitution of the sum of $8,550 from the bankrupt estate on the grounds that the bankrupt estate has been unjustly enriched to that extent at the expense of the petitioner.

2. The Scott Publishing Company is not barred from obtaining equitable relief in these proceedings.

3. The judgments of the courts of the State of Washington are not res adjudicata of the right of Petitioner to restitution from the Trustee for unjust enrichment of the bankrupt estate.

4. These proceedings involve matters which were not, could not and should not have been adjudicated and determined by the proceedings in the state court.

5. These proceedings are not a collateral attack on a valid judgment of the courts of the State of Washington, but a separate equitable proceeding to obtain restitution by reason of unjust enrichment of the bankrupt estate.

GAVIN, ROBINSON &
KENDICK,

Attorneys for Petitioner and Appellant, Scott Publishing Company, Inc., a Corporation.

Affidavit of Mail attached.

[Endorsed]: Filed May 5, 1955. [39]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed

hereto are the originals filed in the above cause, called for in Appellant's Designation filed on May 5, 1955.

Order on Review of February 21, 1955, filed 2/21/55.

Notice of Appeal, filed 3/17/55.

Bond for Costs on Appeal, filed 3/17/55.

Affidavit of Mailing Notice and Bond, filed 3/17/55.

Stipulation and Order Extending Time, filed 4/16/55.

Agreed Statement on Appeal Pursuant to Rule 76, filed 5/5/55.

Statement of Points to Be Relied Upon by Appellant, filed 5/5/55.

Affidavit of Mailing, filed 5/5/55.

Designation of Contents of Record on Appeal, filed 5/5/55.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said district this 6th day of May, 1955.

[Seal] STANLEY D. TAYLOR,
Clerk.

By /s/ THOMAS GRANGER,
Deputy.

[Endorsed]: No. 14759. United States Court of Appeals for the Ninth Circuit. Scott Publishing Company, a Corporation, Appellant, vs. Ralph Rodgers, Trustee in Bankruptcy of Mid-Columbia Publishers, Inc., Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed May 9, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Case No. 14759

SCOTT PUBLISHING CO.,

vs.

RALPH RODGERS, Etc.

STATEMENT OF POINTS AND DESIGNATION UNDER RULE 17, SUBDIVISION 6

In compliance with Rule 17, Subdivision 6 of the rules of the above-entitled Court, the appellant herewith adopts the Statement of Points filed in the United States District Court for the Eastern District of Washington, Southern Division, as the Statement of Points upon which it intends to rely in this appeal.

In further compliance with said rule the appellant designates, as that portion of the record which is material to the consideration of this appeal, all the certified record on appeal which is filed in this Court.

Dated this 12th day of May, 1955.

/s/ JOHN GAVIN,
Of Attorneys for Appellant Scott Publishing Company, Inc., a Corporation.

Affidavit of Mail attached.

[Endorsed]: Filed May 16, 1955.